No. 2525

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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PHOENIX SECURITIES COMPANY
(a corporation),

*Plaintiff in Error,*

vs.

M. E. DITTMAR,

*Defendant in Error.*

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## PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

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FRANK D. MONCKTON, *Clerk.*

*By* ..... *Deputy Clerk.*

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## PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

*To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:*

Plaintiff in error (defendant below) respectfully asks for a rehearing in this case for the reasons and upon the grounds hereinafter set forth:

### I.

**THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS TO THE TESTIMONY OFFERED BY PLAINTIFF, IN SUPPORT OF HIS CLAIM THAT HE WAS ENTITLED TO RECOVER THE REASONABLE VALUE OF HIS SERVICES.**

In the opinion filed herein the Court holds that plaintiff may recover the reasonable value of ser-

vices rendered as a broker if defendant accepted the benefit of such services, notwithstanding that under the terms of an express agreement between the parties, plaintiff was entitled to a commission only in case of a contingency which never occurred. We respectfully submit that this position is untenable and opposed to all of the authorities. The law upon the subject is thus stated in

*Sibbald v. Bethlehem Iron Company*, 83 N. Y. 378:

> "The broker may devote his time and labor and expend his money with ever so much of devotion to the interests of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort or his authority is fairly and in good faith terminated he gains no right to commissions. He loses the labor and effort which were staked upon success, and in such event it matters not that after his failure and the termination of his agency what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met. He may have created impressions which under later and more favorable circumstances naturally lead to and materially assist in the consummation of a sale. He may have planted the very seeds from which others reap the harvest; but all this gives him no claim. It was part of his risk that failing himself and not successful in fulfilling his obligation others might be left to some extent to avail themselves of the fruit of his labors."

Speaking to the same subject, the Supreme Court of the State of California in *Brown v. Mason,* 155 Cal. 155 (160), said:

> "It can not be reasonably said that he was working under an express written contract if he could succeed in fulfilling its terms and under an implied contract if he could not accomplish that desired result. He took the risks of his employment and was subject to the results of failure or success under the provisions of his contract of agency."

To the same effect see also:

*Payseno v. Swenson,* 178 Fed. 999;
*Rees et al. v. Spruance,* 45 Ill. 308;
*Ames v. Lamont,* 83 N. W. 780;
*McArthur v. Slauson,* 9 Id. 784.

In the case at bar the plaintiff did not, acting as a broker or otherwise, find a purchaser for the property. The purchaser went to him upon the erroneous assumption that he was the agent of the owner of the property or interested as an owner therein. Instead of frankly informing the owner that inquiry had been made of him regarding a prospective purchase of the property, plaintiff kept the matter a secret and thereafter succeeded in effecting an arrangement with the seller whereby he could earn a large contingent commission of $10,000 on the sale of the property in the event it went through on certain specified terms. No such sale was ever made. The purchaser *declined* to take the property upon the terms of the option which had been given to it

(p. 72), and then, and then only, was a new contract entered into whereby if the payments stipulated to be made therein are made the seller will receive $19,000 less for the property than it would have received if the option had been taken up; and in addition to this, expenses amounting to about $10,000 have been incurred by the seller in order to carry out the terms of the new contract.

Plaintiff contended in the trial Court that the sale which was finally effected would not have been made if he had not interested himself in bringing the parties together. But this is purely a matter of speculation unsustained by a particle of proof with the probabilities greatly against it. Had plaintiff, when he was approached by the purchaser, informed the purchaser of the situation and had he not, *purely in his own interest,* undertaken to arrange a sale, the purchaser would probably have taken the matter up directly with the owner. The fact is that the services rendered by the plaintiff were rendered wholly in his own behalf and were probably of no real value whatever to the defendant.

In support of his theory that he was entitled to recover the reasonable value of his services, plaintiff offered at the trial evidence as to the value of such services. Objection was made to the offer upon the ground that plaintiff was bound by the terms of his contract and that he must recover under it or not at all. Defendant's objections were overruled and exceptions reserved to the rulings of the Court

(pp. 44, 48-50). Of course if, as the authorities hold, plaintiff under the circumstances stated, is not entitled to recover except under the terms of his contract, the Court erred in admitting the evidence regarding the value of the services rendered and such error necessitated the reversal of the judgment. These rulings of the trial Court bring up for consideration the only questions involved on the appeal and it was therefore wholly immaterial whether or not defendant "requested" the Court to render judgment for defendant upon the trial. Had such a "request" been necessary and had it been made, denied and an exception reserved to the ruling, a discussion of the merits of the exception *would have but raised the same point that is raised by the exceptions to the admissibility of the evidence regarding the reasonable value of plaintiff's services.* This brings us to the consideration of the first point referred to in the opinion filed herein, namely, that defendant did not "request" the Court upon the trial to render judgment for defendant.

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## II.

**PLAINTIFF IN ERROR DID REQUEST THE TRIAL COURT TO RENDER JUDGMENT FOR DEFENDANT AND WHETHER IT DID OR NOT IS WHOLLY IMMATERIAL IN VIEW OF THE EXCEPTIONS RESERVED AT THE TRIAL TO THE RULINGS OF THE COURT PERMITTING PLAINTIFF TO PROVE THE REASONABLE VALUE OF THE SERVICES RENDERED BY HIM.**

In the opinion filed herein the Court holds that

the sufficiency of the evidence to sustain the judgment cannot be reviewed in the absence of a "request" made to the Court by the defendant at the trial that judgment be entered in favor of defendant and an exception reserved to a ruling denying the motion; and that the record fails to show that such "request" was made. The reference to this matter in the opinion of the Court seems to imply that some advantage was lost by not "requesting" the trial Court to render judgment in favor of defendant. That had defendant done so, it would be necessary for the Court to pass upon the question of the sufficiency of the evidence and that it was absolved from so doing by reason of the fact that such request was not made. As we have just pointed out, however, if it be true, as the Court holds, that plaintiff may recover the "reasonable value" of his services notwithstanding his contract and that therefore the Court did not err in admitting evidence upon the question of the value of such services, *it follows necessarily that the evidence was sufficient to justify the judgment* and that no advantage was lost by the fact that defendant did not request the trial Court to render judgment upon the evidence in its behalf. If upon the facts proved, testimony regarding the reasonable value of plaintiff's services was both *material and relevant,* it was only because plaintiff *was not limited to the terms of his agreement with defendant and might recover, notwithstanding that the contingency provided for in such agreement had not occurred.* In other words,

the question of the sufficiency of the evidence *is necessarily involved in the question of the correctness of the ruling of the trial Court admitting evidence respecting the reasonable value of plaintiff's services.* It follows of course that if the Court is right in sustaining the rulings of the trial Court respecting the admissibility of the evidence referred to, the judgment would have to be affirmed *even if a request for judgment had been made at the trial.* The Court necessarily holds *that the evidence was sufficient,* otherwise the evidence respecting the value of the services would be *immaterial and irrelevant.*

But we respectfully submit that the rule to which the Court refers in its opinion should not be held applicable to a case of this kind. The fact is, as shown by the record (p. 33), that the trial began before a jury, but that the jury was dismissed as soon as it became apparent that the evidence presented purely a legal question, namely, whether or not plaintiff could recover at all under the evidence *which was without conflict upon any material point.* After the jury was discharged and the balance of the evidence read to the Court from the depositions, his Honor, Judge Van Fleet who presided at the trial, stated that owing to other engagements, he would not be able to decide the case for a number of months and requested counsel to argue the case upon briefs, and it was so presented (p. 33). Of course, as the mind of the Court was not made up, it would have been wholly out of

place *and utterly useless* for defendant to "request" a decision then and there in favor of defendant, and if such a request had been made the Court would undoubtedly have declined to pass upon it. As the law *never requires a useless thing to be done* the "request" was necessarily excused. Furthermore if a "request" was necessary then *a ruling upon it was also necessary.* Would the Court in such case be required to make a ruling *before it heard the argument?* And if such a ruling was made it would, we must assume, be binding upon the Court and the parties though it might not be in harmony with the final views of the Court!

But assuming that a "request" was necessary we respectfully submit that the brief filed, as the record shows (p. 33), on behalf of defendant in the trial Court in a case such as this which involves *purely a legal question,* is necessarily a "request" for judgment. It is more than this; it is not only a "request" but it is a "request" coupled with a statement of the grounds of the request. It is true that the record shows no formal ruling by the Court upon such request for judgment by defendant but of course the order for judgment for plaintiff is a ruling and such order is deemed to be excepted to.

The rule to which the Court refers, requires in a case tried *before a jury,* in order that the sufficiency of the evidence may be reviewed on writ of

error, that the Court be requested to *instruct the jury* to return a verdict for the defendant. But the practice has never prevailed in cases tried before the Court of requesting the Court *to instruct itself* to decide the case in favor of defendant, and we respectfully submit that the ends of justice are not promoted by holding that any such formal request is necessary. Surely if, as is the fact, counsel for defendant filed with the Court a brief in which he argued that upon the undisputed testimony defendant was entitled to judgment, this is the only "request" that the law exacts or the Courts should hold to be necessary. The merits of a controversy should not, we submit, be allowed to turn upon a refinement between a formal "request" for judgment and a written argument in support of the contention that defendant is entitled to judgment. Such a distinction, if upheld, would tend, it seems to us, to promote the growing disrespect for the law which is now unfortunately so widespread. We most respectfully ask that the Court give this matter further consideration.

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## III.

It is said in the opinion filed herein that defendant did not at the trial urge that there was a variance between *the pleadings* and *the proof* and not having done so, that the point cannot be urged in this Court. But no such point was made in the briefs filed by plaintiff in error herein as an exam-

ination of them will disclose. The point that was urged both in this Court and in the Court below is not one of variance between the *pleadings* and the *proof* curable by amendment, but the point that was and is urged is that the *evidence does not justify a recovery by the plaintiff upon any theory.* In other words, our contention is that defendant was entitled to judgment *assuming that the facts proved had been pleaded.* As a reading of our briefs will demonstrate our entire argument was addressed to the proposition that the *facts proved* did not warrant a recovery *under any form of pleading whatever.*

Dated, San Francisco,
August 2, 1915.

Respectfully submitted,

L. A. Redman,
*Attorney for Plaintiff in Error and Petitioner.*

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Certificate of Counsel.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well-founded in point of law as well as in fact and that said petition is not interposed for delay.

L. A. Redman,
*Attorney for Plaintiff in Error and Petitioner.*